APPELLATE CRIMINAL.

Before Mr. Justice O'Kinealy and Mr. Justice Agnew.

ADYAN SING *v.* QUEEN EMPRESS.*

1886
June 30.

Discharge of accused—Further enquiry and order of commitment passed simultaneously by Sessions Judge—Depositions not read over to accused—Oral evidence—Statement of Mooktear as to faulty record—Criminal Procedure Code (Act X of 1882), s. 360—Evidence Act (I of 1872), s. 91.

A Sessions Judge, after hearing a general statement made by a Mooktear engaged in the case, considered that the depositions of certain witnesses taken in the Magistrate's Court did not conform with the requirements of s. 360 of the Code of Criminal Procedure, and refused to admit the depositions as evidence, and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions on behalf of the Crown; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held*, on appeal, that the conviction and sentence must be set aside.

ON the 31st December 1885 one Adyan Sing was alleged to have inflicted a severe wound on the arm of one Budhun from which he subsequently died.

The Assistant Magistrate who held an enquiry into the case discharged the accused under ss. 209 and 253 of the Criminal Procedure Code.

The wife of the deceased then applied to the Sessions Judge to have the order of discharge set aside.

The Sessions Judge, on the 11th February, passed the following order: "I think the commitment of the accused on a charge of culpable homicide not amounting to murder should be ordered, but before so ordering, notice should be given to Adyan to show cause why such order should not be passed; if it is passed, I shall also direct the examination of the Inspector, Sub-Inspector, Assistant Surgeon and Sub-Deputy Magistrate." On the hearing of this rule the Sessions Judge passed the following order: "I direct the commitment of the accused; it should be made at once, after taking the additional evidence referred to in my proceedings of the 11th instant in the presence of the accused if possible."

* Criminal Appeal No. 331 of 1886, against the decision of T. M Kirkwood, Esq., Sessions Judge of Patna, dated the 29th March 1886.

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During the course of the trial before the Sessions Judge, Counsel for the accused attempted to contradict the witnesses for the prosecution by putting to them questions as to statements made by them in the Court of the Assistant Magistrate, and tendering their depositions in that Court as evidence against them. The Sessions Judge refused to admit these depositions on the ground, apparently, that a Mooktear, who appeared for the defence and who had conducted the case before the Assistant Magistrate, had told him (the Sessions Judge) that the Assistant Magistrate had not read these depositions over to the witnesses, and that it was the constant practice of the Assistant Magistrate to overlook this provision of s. 360 of the Criminal Procedure Code. Counsel for the accused thereupon applied that the Assistant Magistrate might be examined as a witness in the case, but this application was refused on the ground that oral evidence by the Assistant Magistrate as to what was stated to him by the witnesses could not be received, the recorded depositions being the only proof of those statements under s. 91 of the Evidence Act.

At the conclusion of this trial the Sessions Judge, accepting the opinion of the majority of the jury, convicted the accused of grievous hurt and sentenced him to three years' rigorous imprisonment.

The prisoner appealed.

Mr. *G. Gregory* (with him Baboo *Omirtonauth Bose)* for the appellant contended (1) that the order of commitment by the Sessions Judge simultaneously with the order for fresh evidence to be taken by the Assistant Magistrate was illegal; and on this point cited an unreported case of *In re Dahoo Singh*, decided by Prinsep and Grant, JJ., dated 4th March 1886, Criminal Motion number 96 of 1886, in which Mr. Kirkwood, the same Sessions Judge, had directed further enquiry to be made after the accused had been discharged by the Magistrate, and at the same time directed the accused to show cause why he should not be committed by the Sessions Court; and on the hearing of the rule, ordered the commitment of the accused and directed the Magistrate to take the depositions of two fresh witnesses. On the case coming up before Prinsep and Grant, JJ., they set

aside the order of commitment, remarking: "It seems to us that the Sessions Judge's order amounts to simultaneously directing further enquiry into the alleged offence, and to ordering commitment of the accused. Before the accused could be properly committed, it would be necessary to consider the value of the entire evidence against them, including the evidence which is now to be taken. Under these circumstances, we think the order of commitment was premature; it must accordingly be set aside. The Deputy Magistrate will proceed to carry out the orders of the Sessions Judge regarding further enquiry, and pass such orders therein as may seem to him proper on consideration of the evidence to be taken, and on consideration of the evidence previously taken by him." (2) That the Judge was wrong in not accepting the depositions in evidence; that s. 91 of the Evidence Act did not apply; that if the depositions could not be considered as the depositions of these witnesses by reason of the omission of the Magistrate, then it followed that there was no written record of what the witnesses actually said, and parol evidence was therefore receivable. (3) That the statement of the Mooktear should not have been received by the Judge.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The Court (O'KINEALY and AGNEW, JJ.) passed the following order:—

In this case the prisoner has been convicted of causing grievous hurt and sentenced to three years' rigorous imprisonment and a fine of Rs. 200. On his trial before the Sessions Judge of Patna, whilst certain of the witnesses were under cross-examination, their depositions before the committing officer were tendered in evidence in order to contradict what they were then saying.

No objection was taken to the reception in evidence of these depositions by the Crown; but the Sessions Judge, because a Mooktear in Court, who is said to have conducted the case in the lower Court on behalf of the accused, made a general statement that the committing officer was not in the habit of reading over depositions to the witnesses, himself raised the objection, and

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refused to receive the evidence tendered on behalf of the prisoner. We think that he was wrong in doing so. There was no ground on which he could refuse the depositions. Further, we think that if he had refused them rightly, the prisoner should not have been debarred from calling the Assistant Magistrate for examination.

We set aside the conviction and sentence and direct that the prisoner be re-tried.

Let the depositions, if tendered in evidence, be received.

T. A. P. *Conviction set aside.*

PRIVY COUNCIL.

P. C.* 1886 *February* 11, 13, 14, 16.

NAN KARAY PHAW AND OTHERS (PLAINTIFFS) *v.* KO HTAW AH (DEFENDANT).

BY APPEAL.

KO HTAW AH (DEFENDANT) *v.* NAN KARAY PHAW AND OTHERS (PLAINTIFFS).

BY APPEAL.

KO HTAW AH (DEFENDANT) *v.* NAN KARAY PHAW AND OTHERS (PLAINTIFFS).

BY CROSS APPEAL.

[On appeal from the Special Court of British Burmah.]

Account—Set off—Cross appeal.

Of two appeals heard together, the first was brought on the dismissal of a suit, in which the representatives of one, now deceased, of two parties claimed for his estate an account against the other; their suit having been dismissed on failure to prove the contract between the parties; and the second appeal was from a decree between the same parties, for damages for the detention of property which had belonged to the estate of the deceased. In the first, the plaintiffs appealed; and in the second the defendant, who also, by cross appeal, claimed a sum which, as he alleged, would have been found due to him had accounts on both sides been taken in the first of the above suits.

Held, that as the first suit was for an account only, and not for the recovery of money, rendering it at least doubtful whether a set-off could be pleaded in defence; and as, also, no issue had been framed, or even asked for, on the question, it was not open to the defendant to raise it on this cross appeal.

* *Present:* LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR R. COUCH.